

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7578

In The
United States Court of Appeals
For The Second Circuit

EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees
under the Trust Agreement dated November 15, 1968,
made by WILTRUD E. GADBOYS, as Grantor, CECIL G.
HUSKEY, W.T. STRATTON and NORTE & CO., a partnership
composed of JOSEPH C. GALDI and RITA D. GALDI,

Plaintiffs-Appellees,

vs.

THYSSEN-BORNEMISZA EUROPE N.V., THYSSEN-BORNEMISZA
INC., THYSSEN-BORNEMISZA HOLDINGS, INC., MARINE
MIDLAND BANK, INDIAN HEAD INC., JAMES G. FERGUSON,
JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER,
JOHN E. O'SULLIVAN, RICHARD J. POWERS, JAMES E.
ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL E. SMITH,
HERBERT E. BACHRACH, GERARD B. HUISKAMP, H. H.
WELD & CO. INCORPORATED, L. EMERY KATZENBACH, H.
THYSSEN-BORNEMISZA, R. L. GENILLARD
BANK,

Defendants-Appellants

(Continued on Reverse)

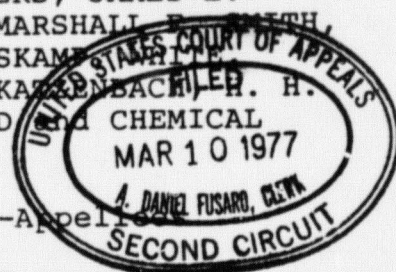
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WILLIAM B. WEINBERGER,

Plaintiff-Appellee,

vs.

RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN,
PAUL W. McALISTER, JOHN E. O'SULLIVAN, JAMES E.
ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F.
SMITH, JAMES G. FERGUSON, THYSSEN-BORNEMISZA INC.
and INDIAN HEAD INC.,

Defendants-Appellees.

SHAMROCK CORPORATION, individually, and on behalf
of all holders of Common Stock and Warrants of
Indian Head Inc. similarly situated,

Plaintiffs-Appellees,

vs.

INDIAN HEAD INC., THYSSEN-BORNEMISZA GROUP N.V.,
THYSSEN-BORNEMISZA INC., WHITE, WELD & CO.
INCORPORATED, RICHARD J. POWERS, JAMES E. ROBISON,
HERBERT E. BACHRACH, GERARD B. HUISKAMP, L. EMERY
KATZENBACH, MARSHALL F. SMITH, H. H. THYSSEN-
BORNEMISZA, R. L. GENILLARD, THYSSEN-BORNEMISZA
HOLDINGS, INC. and CHEMICAL BANK,

Defendants-Appellees.

APPEAL OF MORTON P. ROME AND MARJORIE T. ROME,
TRUSTEES UNDER TRUST AGREEMENT MADE NOVEMBER 22,
1954, FOR THE BENEFIT OF SALLY P, ROME,

Objectors-Appellants.

On Appeal from the United States District Court for the
Southern District of New York.

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COUNTERSTATEMENT OF ISSUES
PRESENTED FOR REVIEW

1. Did the District Court abuse its discretion in approving the settlement of these actions after notice to the plaintiff classes of the terms of the proposed settlement and the right to request exclusion from the classes or to appear and object to the settlement at a hearing thereon, and after a full hearing on approval of the settlement, at which objectors' claims were exhaustively considered?

2. Did approval of the settlement breach contractual or statutory rights of the objectors-appellants?

3. Did the settlement or the notice thereof violate the registration, antifraud or tender offer provisions of federal or state securities laws?

4. Did the judgment and order approving the settlement improperly provide for a permanent injunction against the maintenance of actions by class members based on any individual, class or derivative claims arising out of or relating to the matters set forth in the complaints, including any claim related to consummation of the merger?

COUNTERSTATEMENT OF THE CASE

Defendants-Appellees submit this brief in response to the Brief for Appellants submitted by the objectors-appellants, Morton P. and Marjorie T. Rome, as trustees of

a family trust ("Objectors"), in support of the careful and thorough decision of the District Court approving this major class action settlement. We think it is clear that the judgment below should be affirmed and that the lonely but scattergun assault by the Objectors should be rejected.

The Objectors appeal from a judgment and order entered November 18, 1976 by the Honorable Charles E. Stewart, Jr., District Judge for the Southern District of New York, approving the settlement of these three related class actions. (393a). By that settlement, defendants Indian Head Inc. ("Indian Head") and Thyssen-Bornemisza Inc. ("TBI"), among others, settled all claims arising out of the complaints. Originally the complaints alleged violations of federal securities law and breach of contract in connection with tender offers by Thyssen-Bornemisza Europe N.V. ("TBE")¹ for Indian Head common stock ("Common Stock") and warrants to purchase Common Stock ("Warrants"). Later, following TBI's announcement of a proposed merger of Indian Head into a subsidiary of TBI (58a), the Brucker complaint was amended to charge that the merger violated federal securities law, and those claims were settled as well. (39a).

The first tender offer was made on September 27,

1. References to TBE include Thyssen-Bornemisza Group, N.V., a predecessor of TBE. Following each tender offer, the Indian Head common stock acquired was transferred to TBI, then the American subsidiary of TBE.

1973 in accordance with a memorandum of understanding between TBE and Indian Head. TBE offered to purchase between 750,000 and 1,100,000 shares of Common Stock from the public at \$27 per share and obligated itself to purchase 750,000 additional shares directly from Indian Head at the same price. Upon expiration of the offer, TBE's equity interest in Indian Head was about 34% of the shares then outstanding.

After it had unsuccessfully explored several other possible acquisitions of other, unrelated corporations, on July 12, 1974 TBE offered to purchase all outstanding Common Stock at \$27 per share and all outstanding Warrants at \$2 per Warrant (subsequently increased to \$2.25 per Warrant). TBE's Offer to Purchase disclosed that the New York Stock Exchange ("NYSE") would probably delist the Common Stock if the tender offer were successful.

Pursuant to the second tender offer, TBE purchased additional Common Stock, increasing its equity interest to slightly more than 90% of the Common Stock then outstanding. TBE also purchased all Warrants tendered, about 8% of those outstanding.

On September 24, 1974, the NYSE delisted the Common Stock and the 5-1/2% Convertible Subordinated Debentures due April 15, 1993 ("Debentures"), although those securities continued to be traded over-the-counter.

On December 31, 1974, the Brucker action was

commenced. In the complaint, TBE was charged, inter alia, with violations of federal securities law and breach of the Indenture dated as of April 15, 1968 (the "Indenture") which governs the rights of the holders of Debentures. (7a). The principal theory of the complaint was that Indian Head and TBE had failed to send individual notice of the tender offers to the Debenture holders, thus effectively depriving them of an opportunity to convert their Debentures into Common Stock and tender the stock. The plaintiffs also asserted that the removal of the Debentures from listing on the NYSE breached an alleged obligation of Indian Head to maintain that listing. Therefore, argued plaintiffs, the effect of the tender offers and NYSE delisting was wrongful devaluation of the Debentures, causing the Debenture owners to be "locked in" to an investment of reduced value and without a future. Plaintiffs sought to compel the defendants to redeem the Debentures at their cash redemption price of \$1,033 per \$1,000 principal amount.

The Brucker complaint was followed in March 1975 by the Weinberger complaint, which contained similar allegations, and in April 1975 by the Shamrock complaint, wherein it was claimed that Indian Head and TBE, among others, had breached the Warrant Agreement (149sa) by failing to keep the Common Stock listed on the New York Stock Exchange, and in any event had committed fraud in making the second tender offer.

Defendants had moved for dismissal or summary judgment against all three complaints when, on February 11, 1976, TBI announced a proposed "short-form" merger, under Section 253 of the Delaware General Corporation Law,² of Indian Head into a subsidiary of TBI; pursuant to the terms of the merger the minority shareholders were to receive \$30 per share of Common Stock. TBI also announced that outstanding Debentures would be convertible after the merger into \$779.22 per \$1,000 in principal amount, their conversion value at \$30 per share.³ (58a). Plaintiffs in the Brucker action filed an amended complaint on February 20, 1976 seeking to enjoin the merger and moved the District Court for a preliminary injunction. (39a). On March 4, 1976, the return date of the motion, TBI announced the withdrawal of the merger proposal.

After TBI's decision to withdraw the merger proposal, plaintiffs and defendants determined that it was in their mutual interest to settle these three actions. Several months of negotiations followed, and a Stipulation and Agreement of Settlement of the Brucker and Weinberger actions was signed

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2. Section 253 provides in essence that a company owning 90% or more of each class of stock of another company may merge with that company and eliminate the minority in exchange for securities, cash or other property.
 3. Pursuant to the Indenture, each Debenture was convertible into common stock at a rate of 25.974 shares per \$1,000 principal amount.

on July 20, 1976 (160a) and amended on July 28, 1976 to incorporate the Shamrock action (the "Agreement"). (186a). Under the Agreement, the three actions were to be maintained as class actions for purposes of settlement on behalf of seven classes and sub-classes. The settlement provided that TBI would make cash payments to certain former Debenture and Warrant owners and to all owners of Common Stock, Debentures and Warrants who owned their securities both as of the date of the court's order directing notice to the classes and the date of the proposed merger of Indian Head into a TBI subsidiary.⁴ In return, all claims asserted or encompassed in the three complaints would be dismissed or barred, the merger would be allowed to proceed and owners of Debentures and Warrants would submit their securities to TBI. Provision was also made for a fairness hearing and for mailing and publication of a Notice of Indian Head Inc. Class Actions, Proposed Settlement and Hearing (the "Notice"). (185a-11). Pursuant to the District Court's order entered August 2, 1976 (the "Order") (148a), the Notice was mailed to all class

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4. Whereas the February 11, 1976 merger proposal had offered \$30 per share for Common Stock, \$779.22 per \$1,000 of Debentures and, in effect, nothing for the Warrants (which were exercisable at \$30 per share), the judgment approving the settlement provides to Indian Head securities owners on November 30, 1976, \$32 per share of Common Stock, \$851.65 per \$1,000 of Debentures (including \$7.49 accrued interest), and \$4.00 per Warrant owned on July 2, 1974 and \$2.50 per Warrant owned on August 2, 1976. Sellers of Debentures and Warrants during and after the tender offers are also compensated in amounts related to the market prices for those securities at the relevant times.

members who could be identified from Indian Head records and was also published on a nationwide basis. The Notice described the litigation and the terms of the settlement, and it informed class members of their rights to request exclusion or to appear and object at the hearing set for October 13, 1976.

On September 27, 1976, the Objectors filed a notice of intention to appear and to show cause why the settlement should not be approved as proposed. (193a). The Objectors opposed the proposed settlement as unfair to Debenture holders, essentially on three grounds: 1) that the Order did not require Debenture owner class members to affirmatively elect to be bound by the settlement (i.e., "opt-in"), an omission asserted to violate Rule 23 of the Federal Rules of Civil Procedure; 2) that the provision for a merger which eliminated the convertibility of Debentures into Common Stock breached the Objectors' contractual rights under the Indenture; and 3) that the Agreement, the Notice and the payment terms of the settlement violated registration, antifraud and tender offer provisions of federal and state securities laws. The Objectors' arguments were heard before the court on October 13 and 18, 1976 (207a, 273a) and were rejected in the court's memorandum decision approving the settlement rendered on November 16, 1976. (352a). Following the judgment and order approving the settlement, entered on November 18, 1976 (the "Judgment") (393a), the Objectors filed several motions: 1) for an order altering or amending the Judgment to delete

the permanent injunction against future claims by class members based on the same matters as were encompassed in the complaints (402a); 2) for a partial stay pending appeal (413a); and 3) for an order clarifying and supplementing the record. (427a). Another hearing was held on November 29, 1976 (434a), and Judge Stewart denied each of the motions by endorsement orders. (412a, 426a, 433a). Objectors filed a notice of appeal from the Judgment the same day. (465a).

On November 30, 1976 Indian Head was merged into a subsidiary of TBI, and on December 2, 1976 TBI paid \$12,100,000 into the Debenture Settlement Fund and \$1,450,000 into the Warrant Settlement Fund pursuant to paragraph 2(a) of the Agreement. Notice of the merger was sent to all Common Stock owners informing them of their right to receive \$32 per share under the Agreement and Delaware law. As of March 1, 1977, there had been submitted \$12,097,000 in principal amount of Debentures out of \$14,291,000 outstanding as of August 2, 1976 for payment of \$851.65 per \$1,000; 552,429 shares of Common Stock out of 585,878 outstanding as of August 2, 1976 for payment of \$32 per share; and 310,360 Warrants out of 349,467 publicly outstanding as of August 2, 1976 for payment of \$4.00 or \$2.50, as appropriate. As of that date, a total of \$29,360,668.97 had been paid out to class members in accordance with the settlement terms. Moreover, although the Agreement preserved the appraisal rights of Common Stock owners on the merger date, holders of only 132 shares have

requested appraisal, but none has submitted a claim to the Delaware courts.

For the reasons discussed below, the judgment of the District Court should be affirmed.

ARGUMENT

POINT I

THE OBJECTORS CANNOT SHOW THAT APPROVAL OF THE SETTLEMENT WAS AN ABUSE OF THE DISTRICT COURT'S DISCRETION

The standard for appellate review of class action settlements in the Second Circuit was set forth in City of Detroit v. Grinnell Corporation, 495 F.2d 448, 455 (2d Cir. 1974):

" . . . this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion."

See also Newman v. Stein, 464 F.2d 689 (2d Cir. 1972); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y., aff'd, 440 F.2d 1079 (2d Cir. 1970), cert. denied sub nom., Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

To demonstrate an abuse of discretion the appellants must show that the District Court clearly ignored the facts or the law. Settlement approvals have been rejected by appellate courts where the lower court: 1) acted without

requiring a record of sufficient facts to evaluate the claim; 2) failed to allow objectors to develop on the record facts showing that the settlement procedures mandated by Rule 23 were not followed; or 3) committed clear error with respect to the law governing a defendant's liability. Newman v. Stein, 464 F.2d 689, 692-93 (2d Cir. 1972). See also Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) (order disapproving proposed class action settlement affirmed on ground that district judge is entitled to view with more weight what plaintiffs seek in their complaint than what the settlement provides); Percodani v. Riker-Maxson Corp., 50 F.R.D. 473 (S.D.N.Y. 1970), aff'd sub nom., Farber v. Riker-Maxson Corp., 442 F.2d 457 (2d Cir. 1971) (proposed class action settlement disapproved on ground that proponents failed to show it was fair and reasonable in light of damages sought and the likely result of victory for plaintiffs as compared with amount of settlement offered). In all cases great weight is to be accorded the views of the trial judge, because he or she is best able to evaluate the case. Grinnell, 495 F.2d at 454, citing, Ace Heating & Plumbing Co. v. Crane Company, 453 F.2d 30, 34 (3d Cir. 1971).

Once it has been shown to the satisfaction of the District Court that proper procedures under Rule 23 have been followed, the court must consider the substantive claims raised by the plaintiffs and the Objectors--not on the merits, but in terms of the reasonableness of the amount of the settlement

in relation to the likelihood of success after trial:

"It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable."

Young v. Katz, 447 F.2d 431, 433 (5th Cir. 1971), citing, Neuwirth v. Allen, 338 F.2d 2 (2d Cir. 1964).

A review of the record will reveal that instead of "mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law," the Judgment was based upon "well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors." Newman v. Stein, 464 F.2d at 692, quoting, Protective Committee v. Anderson, 390 U.S. 414, 434 (1968). The appellate court "need not and should not reach any dispositive conclusions on the admittedly unsettled legal issues," nor should it substitute its judgment as to the reasonableness of the settlement for that of the District Court. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1985-86 (2d. Cir.), cert. denied sub nom., Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971). Since the Objectors cannot demonstrate that Judge Stewart's analysis of the legal issues was in error, there is no reason for this Court to intervene.

1. The Debenture Owner Class was more than adequately represented.

The Objectors contend that certification of the Debenture Owner Class was improper because, among other things, there was a "clear lack of adequate representation" as well as "a disregard of the standards of strict scrutiny which must be applied before a judicial finding that the Rule 23(a)(4) prerequisite to a class action existed." Brief for Appellants at 28.

Rule 23(a) sets forth the requirement for adequate representation as follows:

"One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class."

Adequacy of representation is a question of fact⁵ committed to the informed discretion of the court. Because adequacy of representation has constitutional dimensions, the court must carefully scrutinize representation in all

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5. Professor Moore suggests the following tests: 1) whether the interest of the named party is coextensive with the interests of the other members of the class; 2) whether his interests are antagonistic in any way to the interests of those whom he represents; 3) the proportion of those made parties as compared with the total membership of the class; 4) any other facts bearing on the ability of the named party to speak for the rest of the class. 3B Moore's Federal Practice ¶23.07[1], at 352-53 (2d ed. 1975).

class actions. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (hereinafter "Eisen II").

The Objectors' claim that a disqualifying antagonism⁶ exists between the named representatives and certain of the Debenture holders because Debenture holders' rights are individual and separate, and the interests of the representatives of the Debenture Owner Class who favored the settlement "were not the same or even similar to those Debenture owners who did not affirmatively consent" to the settlement. Brief for Appellants at 28. The Objectors suggest that a separate class or sub-class should have been created and a separate representative designated to advocate their position. The Objectors apparently believe that any settlement negotiated by plaintiffs' counsel puts the plaintiff class representatives in conflict with those class members who dislike the result; they conclude that the plaintiffs are therefore inadequate representatives and the settlement must be judicially disapproved. To uphold such an argument would make any settlement impossible. Rule 23 provides instead that an unsatisfied class member may either appear and represent himself, thus supplanting the representation otherwise afforded by the plaintiffs, or he may request

6. The District Court, by its Order of August 2, 1976, designated Edward Brucker and Daniel R. Kaplan as representatives of all the classes and William B. Weinberger as co-representative of the Debenture Owner Class and the Debenture Seller Classes. (185a-4).

exclusion from the class if he prefers to litigate.

The Objectors' "affirmative consent" theory tracks the concept of "opting-in" which was specifically rejected by the drafters of revised Rule 23. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 397 (1967). It also more closely resembles permissive intervention and actual joinder of parties than the kind of representative participation contemplated in class actions. See, e.g., Amalgamated Workers Union v. Hess Oil Virgin Islands Corp., 478 F.2d 540 (3d Cir. 1973). By appearing at the hearings on the approval of the settlement and taking full advantage of the opportunity to present briefs and argue their position, the Objectors obtained representation for their views. There was no longer any question of adequacy of representation, since that requirement was satisfied by the very fact of the Objectors' opportunity to present their arguments.

"It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties. . . ."

Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) (Citations omitted and emphasis supplied).

In American Employers' Insurance Company v. King Resources Co., 20 F.R. Serv. 2d 161, 166 (D. Colo. 1975),

the court rejected an objector's argument that it could not be bound by the settlement unless it was "adequately represented" during each stage of the negotiations leading up to the settlement proposal. The court observed that

"[i]t is well established, under the rule of *Hansberry v. Lee*, . . . , that an absent member of a class is bound to the court's judgment only if he was adequately represented by the named parties or class representatives But an objecting party, can never be an absent member of the class. He receives notice and an opportunity to participate in the determination of the settlement's fairness. In short, an objecting party is not, in a settlement context, dependent upon the representation of some other, possibly hostile party." *Id.* at 164.

There is no affirmative duty imposed upon the representative plaintiff to demonstrate that the whole or a majority of the class considers his representation adequate, nor can silence be taken as a sign of disapproval. *Eisen II*, 391 F.2d 555, 562 (2d Cir. 1968).

"A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights The court need only concern itself with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice." *Id.* at 563.

In addition, at the settlement stage, a common interest is no longer the primary consideration:

"Indeed, as to the relative benefits which the various individuals and groups within the [classes] are to receive from the settlement, there are obvious conflicts. But these conflicts and any disparity

in benefits go to the 'fairness' of the settlement, and not to the 'adequacy of representation.'

American Employers' Insurance, 20 F.R. Serv.2d at 166.

Moreover, in Grinnell, 495 F.2d at 465, this Court approved a settlement negotiated by counsel who represented all of the plaintiff classes, thus dispelling any notion that such "obvious conflicts" constitute inadequate representation in a settlement context. Here, the overwhelming majority of those class members who chose to communicate with counsel agreed that their interests were served by the settlement. The owners of at least \$1,384,000 principal amount of Debentures made it known to their representative counsel that they wished to receive their cash payments under the settlement.⁷

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7. Consistent with the standards set forth in Grinnell for evaluating the fairness of a settlement, Judge Stewart took note of the affidavit of lead counsel for the plaintiffs in support of the proposed settlement (646a), where it was stated that:

"Out of \$14,295,000 convertible debentures, the owners of \$1,240,000 communicated with us. The owners of \$1,212,000 (including L.F. Rothschild & Co.) indicated acceptance, the owners of \$27,000 opted out (not including \$25,000 of the Rome objectants referred to hereafter) [nor including \$5,000 in Debentures owned by Taussig & Taussig, who requested exclusion and are represented by the Objectors' attorneys in a separate action]. The owner of \$1,000 said she would not sell a \$1,000 bond for \$844.16. [The acceptance of an additional \$172,000 was noted at the hearing, Transcript of October 13, 1976 (224a).]

Out of 585,386 shares of publicly held common stock, the owners of 4,851 shares communicated with us,

Where notice of the class action and of the terms of the proposed settlement is accompanied by notice of the right to opt-out of the designated classes,⁸ there is no infringement on due process even if adequacy of representation by the class representatives could be shown to be lacking. The Tenth Circuit, in considering a motion for relief from judgment on the ground of inadequate representation in a class action, concluded that:

"[D]ue process was satisfied here when [movant] received the notice and order delineating the terms of the proposed settlement and informing [it] that it was a designated member of a class, that it had the opportunity to opt out or be represented by counsel, that it would be bound if it failed to opt out. In such a case, we conclude that due process may be satisfied by notice alone and that, where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity."

In Re Four Seasons Securities Laws Litigation, 502 F.2d 834, 843 (10th Cir.), cert. denied, 419 U.S. 1034 (1974). (Emphasis supplied.)

Footnote 7 Cont'd

with the owners of 701 shares indicating acceptance, the owners of 3,271 shares opting out, and one of 1,050 shares objecting.

Out of 349,467 publicly held warrants, the owners of 9,070 communicated with us, all of whom indicated acceptance." Affidavit of William Klein II sworn to October 12, 1976 (656-57a). [Bracketed material supplied.]

8. The Objectors have not complained that any class member (including non-assenting Debenture holders) did not receive the Notice.

The Tenth Circuit reached this conclusion by examining the mandates of constitutional due process. See Hansberry v. Lee, 311 U.S. 40 (1940). It was also mindful of the overall purpose of Rule 23 to avoid multiplicity of actions, and by the general policy of the law in favor of the compromise and settlement of disputed claims, particularly in complex litigation. Four Seasons, 502 F.2d at 843-44.

Of course, a court may not approve an inadequate notice of a class action and place the burden on those with adverse interests to exclude themselves. Pomierski v. W. R. Grace & Co., 282 F. Supp. 385, 392-93 (N.D. Ill. 1967). But here, where the alleged adverse interest is based upon substantive error in construing the Indenture and procedural error in construing Rule 23 to require representation of an opt-in class of non-assenting debenture holders, there is no support for the allegations of inadequate representation and, therefore, no basis upon which to find that the District Court abused its discretion in certifying the classes.

Finally, adequacy of representation was further insured by the operation of Rule 23(e) requiring court approval of the settlement. This minimized the danger that the rights of non-party class members would be unfairly compromised. Eisen II, 391 F.2d at 564. The District Court heard the Objectors' allegations, considered them at length in its decision, and did not find them of sufficient force to

undermine the settlement or to cast doubt on the adequacy of representation provided to the Debenture classes.

2. The adequacy of the Notice cannot seriously be challenged.

In these Rule 23(b) (3) actions the notices required under Rule 23(c) (2) and (e) were combined in the Notice issued pursuant to the Order of August 2, 1976.⁹ The Objectors contend that disclosure standards of the securities laws applied to the Notice because it required a securities investment decision. They allege "omissions . . . of material facts under any standard of materiality, all of which would have assumed actual significance in the deliberations of a reasonable convertible Debenture owner in determining as a class member his choice of action in the transaction." Brief for Appellants at 39. This garbled logic entirely misconstrues the function of a Rule 23 notice.

Because of the res judicata effect of a class action judgment upon absent class members, due process requires that notice of the proposed settlement be given to a Rule 23(b) (3)

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9. The combination of these notices frequently has been permitted. See e.g., In re Four Seasons Securities Laws Litigation, 493 F.2d 1288 (10th Cir.), cert. denied, 419 U.S. 1034 (1974); Supermarkets General Corporation v. Grenvill Corporation, 490 F.2d 1183 (2d Cir. 1974); Feder v. Harrington, 58 F.R.D. 171 (S.D.N.Y. 1972).

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class. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156
(1974). The notice must be

"... reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)." Id. at 174.

The District Court found that the Notice precisely conformed to this requirement. The Notice was mailed to each and every member of the classes identifiable from Indian Head records; the Order also directed brokerage houses and other financial institutions to transmit the Notice to the beneficial owners of the securities. In addition, the Notice was published in the New York Times and several editions of the Wall Street Journal for one day in two successive weeks, all

10. Rule 23 provides, in relevant part:

(c) (2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

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(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

under the terms of the Order.

Regarding the contents of a notice, the Eighth Circuit, in Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir.), cert. denied, 423 U.S. 864 (1975), recommended that it consist of

" . . . a very general description of the proposed settlement, including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses."

In response to the appellant's challenge that the Grunin notice was misleading and insufficiently informative, the court stated that:

"Class members are not expected to rely upon the notice as a complete source of settlement information. . . . Any ambiguity regarding the substantive aspects of the settlement could be cleared up by obtaining a copy of the agreement as provided for in the first paragraph of the notice." Grunin, 513 F.2d at 122.

There is no requirement that the settlement agreement itself be sent to each class member. Grunin, 513 F.2d at 122, citing, Manual for Complex Litigation, Part I §1.45 (1973). Here, the Agreement was on file with the Clerk of the Court and available to anyone who wished to examine its terms in detail. Moreover, for the reasons adduced by the Grunin court, the Notice was not intended to be comprehensive. It is not the function of a notice or even of a settlement agreement itself to summarize the history of the litigation, the motivations of the parties throughout settlement

negotiations (cf. Brief for Appellants at 40), or the economic considerations which influenced the amount of cash offered in settlement.

More particularly, it certainly was not the function of the Notice to anticipate and disclose the possible objections of a class member to the terms of the settlement. These actions would never have been settled if all of the information deemed appropriate by the Objectors were included in the Notice.¹¹ The very purpose of a compromise is, after all, "to avoid the trial of sharply disputed issues and to dispense with wasteful litigation." Newman v. Stein, 464 F.2d 689, 692 (2d Cir. 1972).

Finally, with respect to the Objectors' argument that the "Plaintiffs' Counsel's Recommendation of Settlement" in the Notice lacks neutrality and objectivity of tone, it should be pointed out that the Eighth Circuit, in dealing with this issue, emphasized that it is "the court", and not plaintiffs' counsel, which must be "scrupulously neutral" in expressing no opinion on the merits of the case or the

11. See Brief for Appellants at 40-41. Judge Stewart rejected the Objectors' allegations that the omission of various information from the Notice violated the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and determined that the Notice was "more than adequate" (374a). The Objectors' failure to show that the Notice did not comply with Rule 23 gave Judge Stewart no basis upon which to sustain their claims.

amount of the settlement. Grunin, 513 F.2d at 122.

Plaintiffs' counsel here merely gave his opinion to the class members, who were free to inspect any document, to pose any question, or to retain other counsel to represent their individual interests. The value of plaintiffs' counsel's recommendation should not be minimized, since the opinion of experienced counsel favoring a settlement is "entitled to considerable weight." See Horenstein v. Waddell & Reed, Inc., [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,678 at 98,978 (S.D.N.Y. 1970); Josephson v. Campbell, [1968-69 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,347 (S.D.N.Y. 1969); Fielding v. Allen, 99 F. Supp. 137, 144 (S.D.N.Y. 1951).

Consistent with the discretion committed to the trial judge under Rule 23, the Notice was court-approved and court-supervised. The court reviewed the Notice again in approving the settlement and was satisfied that "[a]ll material facts were included." (367a). There is no basis in the record upon which the Objectors can show that Judge Stewart abused his discretion in so finding.

3. Certification of classes for purposes of settlement is proper where putative class representatives are not in competition.

The Objectors contend that the certification of these class actions "for purposes of settlement only" denied members of the Debenture Owner Class the opportunity to show inadequacy of representation. Brief for Appellants at 29.

This, they allege, was unauthorized by Rule 23 and ignores the advice against such conditional certification in the Manual for Complex Litigation, Part I §1.40 (1975). Judge Stewart looked to the controlling law in this circuit, City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974), and was guided by the analysis of conditional certification there, particularly the observation that the Manual's recommendations "were not meant to be intractable rules." Grinnell, 495 F.2d at 466. He determined that the major concerns of the Manual's editors had been satisfied.¹² The agreement "provided for notice of a hearing and an opportunity to challenge the fairness or any other aspect of the proposed settlement." Grinnell, 495 F.2d at 466. The settlement had not been negotiated at a "premature" stage in the dispute, but after lengthy and vigorously contested litigation. There was no problem of different counsel vying to be class representative before the settlement agreement was reached and publicized. Moreover, the Objectors' allegations that the settlement was adverse to their interests were fully heard by the court and rejected after due consideration of the provisions of the Indenture and proper procedure under Rule 23. Grinnell, 495

12. The chief danger the editors sought to guard against was that an unofficial class representative would accept an inadequate settlement because of the defendants' ability to negotiate with other unofficial representatives to obtain a settlement on less advantageous terms to the class. Manual for Complex Litigation, Part I §1.46 (1975); See also Ace Heating & Plumbing Co., Inc. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971).

F.2d at 465. There is no basis on which to conclude that Judge Stewart abused his discretion in certifying the class actions for purposes of settlement only.

POINT II

THE SETTLEMENT DOES NOT BREACH THE DEBENTURES OR THE INDENTURE

The rights of Debenture holders are contractual and are determined by construing the terms of the Debenture certificates and the Indenture pursuant to which they are issued. See Van Gemert v. Boeing Co., 520 F.2d 1373, 1383 n.19 (2d Cir. 1975), cert. denied, 423 U.S. 947 (1975), citing, Kaplan v. Vornado, Inc., 341 F. Supp. 212 (N.D. Ill. 1971) and Buchman v. American Foam Rubber Corp., 250 F. Supp. 60 (S.D.N.Y. 1965).

1. The Indenture authorized the merger and conversion of Debentures into cash.

The Objectors contend that the District Court erred in permitting the settlement and merger, which the Objectors claim involve an alteration or impairment of their conversion rights under the Indenture. In essence, they argue that the Indenture confers a right to convert Debentures into Common Stock of Indian Head and that right cannot be terminated in a merger without the consent of each Debenture holder. The Indenture specifically refutes that argument. Section 13.01 provides, in pertinent part, that:

"The Company will not . . . merge into . . . any person unless . . . (b) such successor corporation . . . shall expressly assume, by indenture supplemental hereto satisfactory in form to the Trustee . . . the due and punctual payment of the principal of and interest (and premium, if any) on the Debentures according to their tenor, and the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture and the Debentures to be performed or observed by the Company. . . . Subject to the foregoing provisions of this Section, nothing contained in this Indenture or in any of the Debentures shall prevent any . . . merger of the Company . . . into any other corporation. . . ."
(569a).

Section 13.01 requires the successor corporation resulting from the merger to assume the responsibility of paying the principal of and interest on the Debentures, and also to observe the other terms, covenants and conditions imposed by the Indenture.

Section 13.02 refers to Section 5.06 for specific terms, covenants and conditions arising by virtue of the merger itself:

"In case of any such . . . merger . . . and upon the execution by the successor corporation of an indenture supplemental hereto, as provided in Section 13.01, and upon compliance by such successor corporation with all applicable provisions of Section 5.06, such successor corporation shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as a party. . . ." (570a).

Section 5.06, in relevant part, provides as follows:

"In case of any . . . merger of the Company into another corporation . . . such successor . . . shall execute and deliver to the Trustee a supplemental indenture . . . providing that the holder of each Debenture then outstanding shall have the right thereafter to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such . . . merger . . . by a holder of the number of shares of Common Stock of the Company into which such Debentures might have been converted immediately prior to such . . . merger. . . ." (Emphasis supplied.) (514-15a).

Section 5.06 of the Indenture stands alone and is a direct and unqualified command that the successor corporation in a merger "shall execute" a supplemental indenture which preserves the rights of Debenture holders in parity with those of Common Stock holders. Section 5.06 does not require consent by each Debenture holder to the supplemental indenture to be delivered by the successor corporation. Their rights are fully protected without resort to such consent because Section 5.06 obligates the successor corporation to assure Debenture holders of the right to convert into the very same stock, securities and property received by holders of Common Stock in the merger.

In the face of these specific provisions, the Objectors assert that the settlement and merger violate the Indenture. They rely solely on Section 12.02, which deals with amendments to the Indenture. Section 12.02 permits the obligor and the Indenture Trustee, with the consent

". . . of not less than 66-2/3% in aggregate principal amount of the Debentures at the time

outstanding, . . . to . . . enter into an indenture or indentures supplemental hereto . . . for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of any supplemental indenture or of modifying in any manner the rights and obligations of the holders of the Debentures and the Company [Indian Head]; provided, however, that no such supplemental Indenture shall (i) extend the fixed maturity of any Debentures, or reduce the principal amount thereof, or reduce the rate or extend the time of payment of interest thereon, or reduce any premium payable upon the redemption thereof, or alter or impair the right to convert the same into shares of Common Stock at the rates and upon the terms provided herein, without the consent of the holder of each Debenture so affected, or (ii) reduce the aforesaid percentage of Debentures, the holders of which are required to consent to any such supplemental indenture, without the consent of the holders of all Debentures then outstanding." (Emphasis supplied.) (566a).

This section does no more than provide a procedure whereby the obligor may seek substantive amendments to the Indenture with the consent of two-thirds or all of the Debenture holders, as necessary, depending on the nature of the desired amendment. The simple answer to the Objectors' argument is that it was entirely unnecessary to seek the authorization of the Debenture holders because neither the settlement of these actions nor the merger required any amendment of or change in Sections 13.01 and 5.06 of the Indenture.

Here, by virtue of Section 253 of the Delaware General Corporation Law, pursuant to which the merger was accomplished, a holder of Common Stock has only the right

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to receive cash for his stock. Sections 13.01 and 5.06
of the Indenture require that the Debenture owners have the
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same right. The Objectors' argument that a supplemental

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13. Section 259 of the Delaware General Corporation Law expresses that state's policy that the obligations of the extinguished corporation in a merger survive as obligations of the surviving corporation. See Western Air Lines v. Alleghany Airlines, 383 A.2d 145 (Del. Ch. 1973). This requirement has been observed in Section 13.01 of the Indian Head Indenture. No basis exists for Objectors to allege a violation of the statute.
14. It is well established in the case law that a convertible debenture holder's conversion rights may be totally extinguished in a merger unless the indenture or a statute provides otherwise. See Helvering v. Southwest Consolidated Corp., 315 U.S. 194, 200-201 (1942); Lisman v. Milwaukee, L.S. & W. Ry., 161 F. 472, 477-479 (C.C.E.D. Wis. 1908), aff'd per curiam, 170 F. 1020 (7th Cir), cert. denied, 214 U.S. 520 (1909); American Bar Foundation, "Commentaries on Indentures" 527 (1971); G. Hills, Convertible Securities - Legal Aspects and Draftsmanship, 19 California L. Rev. 1, 20-21, 32 (1930). In Parkinson v. West End St. Ry. Co., 173 Mass. 446, 53 N.E. 891 (1899), Judge (later Mr. Justice) Holmes delivered the landmark opinion:

" . . . if the corporation which made the bond finds it for its interest to go out of existence at or before the maturity of the obligation, the option given to the bondholder will not stand in the way. The option gives merely a spes, not an undertaking that the corporation will continue for the purpose of making it good . . . the contract does not prevent the corporation from consolidating with another in such a way as to make performance impossible, any more than it prevents the issue of new stock in such a way as to make performance valueless.

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"It is uninstrusive to say that the consolidations preserve all obligations. The question is whether this obligation is not of such a nature that by its own terms it ceases to operate in the event which has happened

indenture entered into pursuant to Section 5.06 alters or impairs the very right provided by that section is, at best, contrived.

Broenen v. Beaunit Corporation, 305 F. Supp. 688 (E.D. Wisc.), aff'd, 440 F. 2d 1244 (7th Cir. 1970) confirms this conclusion. In Broenen, subordinated convertible debenture holders argued that the covenants in the indenture governing their rights had been violated by the form of the merger agreement between the issuer and its merger partner. Before the merger, the debentures were convertible into the common stock of the issuer; after the merger and pursuant to a supplemental indenture executed by the indenture trustee and the successor corporation, they could only be converted into the common stock of the parent of the successor corporation. Accordingly, the debenture holders were no longer able to acquire an equity interest in the issuer of the debentures or to exchange their debentures for equity on a tax-free basis.

Footnote 14 Cont'd

A consolidation which makes no arrangement for furnishing stock in the new company, and which ends the existence of the old ones, as a general rule may be presumed to put an end to the right of bondholders to call for stock, not because the law has not machinery for keeping such a right alive, but because, not being bound to do so, it has made dispositions which manifestly take no account of it." (173 Mass. at 448-49, 53 N.E. at 892) (Emphasis supplied.)

The court examined the provisions of Section 13.01 of the indenture (containing language virtually identical to Section 13.01 of the Indian Head Indenture) and concluded that there was

" . . . no doubt that after the merger the primary and undivided responsibility for the performance of all obligations with regard to the debenture lay with [the successor corporation]." 440 F.2d at 1248.

It also examined Section 5.10 of the indenture (containing language virtually identical to Section 5.06 of the Indian Head Indenture), noting that it permitted the supplemental indenture to provide for conversion into "shares of stock and other securities and property receivable upon . . . such merger . . . by a holder of the number of shares of common stock of [the predecessor corporation] into which such Debenture might have been converted immediately prior to such . . . merger" (Emphasis added by the court.) The court concluded that the indenture language permitted substitution of the parent's common stock for that of the successor corporation. Id. at 1248-49.

In response to plaintiff's argument that the indenture language was "standard boiler plate" in such indentures prior to an amendment of New York law allowing the exchange of "cash or other consideration" in a statutory merger, the court held that the parties to the indenture must be presumed to have included the "other securities and

property" language with awareness that New York law then permitted substitution of cash or other consideration for common stock of the successor corporation.

Section 16.09 of the Indian Head Indenture states that it shall be deemed to be made under the laws of the State of New York. (576a). New York courts hold cash to be property:

"Money is property both by definition...and by common understanding." People v. Wagner, 120 Misc. 214, 217, 198 N.Y.S. 65, 68 (Sup. Ct. 1923).

"The word 'property', as defined by sections 2, 3 and 4 of the Statutory Construction Law...embraces money." Fullerton v. Young, 46 Misc. 292, 294, 94 N.Y.S. 511, 512 (Sup. Ct. 1905).

Section 39 of the New York General Construction Law (McKinney 1892) states that cash is personal property:

"The term personal property includes chattels, money, things in action, and all written instruments themselves. . . ."

The United States Supreme Court considers money to be property:

"Money is certainly property, whether we regard any of its forms or any of its theories." Pirie v. Chicago Title and Trust Company, 182 U.S. 438, 443 (1900).

One must conclude, therefore, that there is compliance with Section 5.06 of the Indenture if the right to convert into cash is preserved, just as the Broenen court concluded that such compliance must be found in preservation

of the right to convert into other securities. The Debenture holders who elect to convert will receive exactly what they are entitled to obtain under Section 5.06: parity with common stockholders' rights through the right to convert into \$831.17 per \$1,000 of Debentures.¹⁵ Under the settlement, of course, they would receive \$851.65.

Judge Stewart's conclusion "that the settlement abridges no rights of the debenture holders and can properly bind all debenture holders who do not opt out" (370a) is indisputably correct.

2. Notice of the Indenture provisions
is not an issue.

The Objectors also attack the settlement on the ground that the Debentures did not provide adequate notice of their rights in the event of merger. They assert that Section 5.06 of the Indenture was somehow deficient in terms of Van Gemert v. Boeing Co. 520 F.2d 1373 (2d Cir. 1975), because it was "buried . . . in the 100-page Indenture" and permitted alteration of their conversion rights without their consent.¹⁶ Brief for Appellants at 45. Van Gemert does not

15. Since each \$1,000 principal amount of Debentures is convertible into 25.974 shares of Common Stock, multiplying 25.974 by \$32 produces \$831.17.

16. The Objectors' arguments under Van Gemert are fundamentally inconsistent with their position that the settlement and merger breaches their rights under the Indenture. Throughout the settlement proceedings and in this appeal, they have claimed that Section 12.02

support these claims. It concerned only whether published notice of redemption was adequate to protect investors from loss occurring from failure to convert before redemption. Here, the question of notice does not exist because the Debenture holders would not gain by converting into Common Stock prior to the merger -- in fact they would have lost the difference between the settlement (\$851.65) and the conversion price (\$831.17) by doing so. In Van Gemert, on the other hand, the debenture holders had to elect to convert prior to a cut-off date in order to avoid the loss attendant upon redemption; this Court found inadequate a brief provision of the Indenture allowing the obligor to publish notice of the redemption, particularly since the debentures were silent as to the method by which notice of redemption would be communicated and did not alert the holders that (contrary to their reasonable expectations) mailed notice would not be provided. Here, as the District Court found, the Debenture holders were alerted to the detailed merger sections of the Indenture by the statement on the Debentures that:

Footnote 16 Cont'd

of the Indenture prohibits termination of their conversion rights into Common Stock without the consent of each Debenture holder affected. In their arguments based upon Van Gemert, they concede the logic of the District Court's analysis of the Indenture, yet urge that this "logic of words should . . . yield to the logic of realities" and "the applicable standards of right conduct." Brief for Appellants at 43. In effect, they concede that the Indenture does permit the settlement and merger, but that they were inadequately notified of that fact.

"Subject to the provisions of the Indenture, the holder hereof has the right . . . to convert this Debenture into fully paid and non-assessable shares of Common Stock of the Company . . . subject to such adjustment, if any, of the conversion rate and the securities or other property issuable upon conversion as may be required by the provisions of the Indenture." (204a).

The Objectors insist that this clause pertains only to provisions in the Indenture concerning adjustment of the conversion rate. They look to Article Five of the Indenture and note the provisions of Sections 5.03 and 5.04, but disingenously ignore Section 5.06, which deals specifically with the rights of Debenture holders upon consolidation or merger. Brief for Appellants at 44. The Objectors cannot expect this Court to overturn the decision below on the basis of such a distorted presentation of the facts and applicable law.

POINT III

THE SETTLEMENT DOES NOT VIOLATE ANY STATUTORY RIGHTS OF THE OBJECTORS

1. The settlement did not violate Section 5 of the 1933 Act.

Contrary to the Objectors' assertions, the payment of cash for debentures in settlement of claims is not an unlawful issuance of securities under Section 5 of the Securities Act of 1933. The settlement agreement is not an offer to sell any security because, among other things, cash

is to be paid, rather than securities issued, to the Indian
Head security holders.¹⁷ See SEC v. W.J. Howey Co., 328 U.S.
293 (1946).

Nor is the settlement agreement an "offer to buy" as that term has been interpreted under the 1933 Act. As explained in the definitive text on securities law, 1 L. Loss, Securities Regulation 212 (2d ed. 1961), the term "offer to buy" applies only to a situation having no relevance whatsoever to the settlement:

"In fact, it is clear from the legislative history that the 'offer to buy' prohibition was originally inserted solely for the purpose of preventing dealers from making offers to buy from underwriters during the waiting period -- or, as §5 has now been amended, before the filing of the registration statement. 'Otherwise,' the House committee observed, 'the underwriter, although only entitled to accept such offers to buy, after the effective date of the registration statement, could accept them in the order of their priority and thus bring

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17. Section 2(1) of the Act defines the term "security" to include the commonly known documents traded for speculation or investment:

"The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

pressure upon dealers, who wish to avail themselves of a particular security offering, to rush their orders to buy without adequate consideration of the nature of the security being offered."

Professor Loss then cites the legislative history:

H.R. Rep. No. 85, 73rd Cong., 1st Sess. (1933) 11.
"The words 'or offer to buy' are removed to the new section 5(c) to serve their present purpose of preventing dealers from being committed to underwriters or the issuer without being informed."
S. Rep. No. 1036 at 15 and H.R. Rep. No. 1542 at 24, 83rd Cong., 2d Sess. (1954). 1 L. Loss, Securities Regulation 213 n. 92 (2d ed. 1961).

Professor Loss later commented on the incongruity of applying Section 5(c) as the Objectors would do here:

"When the issuer itself is making an offer to buy its own securities--at least when the offer goes to a substantial number of security holders--§5(c) would seem literally to apply in the sense that there is no specific exemption or exclusion; for that is an offer (and hence a transaction) 'by an issuer.' On the other hand, however tempting it might have been before the special legislation of 1968 to reenforce Rule 10b-5 under the 1934 Act by using §5(c) to attack the problems of inadequate disclosure by issuers in public tender offers . . . not merely the legislative history of §5(c) but the whole registration structure of the 1933 Act is utterly inconsistent with any concept of issuers registering public offerings to buy as distinct from public offerings to sell." 4 L. Loss, Securities Regulation 2317-8 (Supplement to 2d ed., 1969).

If it would be incongruous to apply Section 5(c) to purchases by an issuer, it would be equally incongruous in this case, where TBI, the 90% stockholder of the issuer, is settling claims that it be required to redeem the securities, and is doing so under a court-approved settlement.

Section 3(a)(10) of the 1933 Act strongly suggests that Section 5(c) of the Act is inapplicable where cash is being offered in exchange for outstanding securities pursuant to court approval. SEC rulings have applied this exemption to exchanges of securities made pursuant to a litigation settlement to be approved by a court. See LIN Broadcasting Corp. [1972-1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,154 at 82,154 (warrants issued by a broadcasting company in settlement of class actions by its present and former shareholders were exempt under Section 3(a)(10)); VTR, Inc. [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep., ¶ 78,518 at 81,117 (a proposed distribution of common stock to the corporation by two of its officers in settlement of a class suit to be approved by the court was exempt from registration under Section 3(a)(10)). Because Section 3(a)(10) exempts

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18. Section 3(a). Except as hereinafter expressly provided the provisions of this title shall not apply to the following classes of securities:

. . . .

(10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval.

from registration a security issued in exchange for outstanding securities pursuant to court approval, it reflects Congress' view that such issuance is not an "offer to buy" securities. A fortiori, if a potentially speculative securities offer may be so exempted, court-approved settlement payments must be also. Obviously, the key element is court approval, not the medium of exchange.

2. The settlement did not violate the tender offer provisions of the 1934 Act.¹⁹

There is no support for the Objectors' assertion that the Notice was a tender offer in violation of the provisions of Sections 13(d), 13(e), 14(d) and 14(e) of the Securities Exchange Act of 1934 and the rules promulgated thereunder. In addition to rejecting that patently absurd attempt to obfuscate the function of a Rule 23 notice, Judge Stewart analyzed the legislative history of those sections

19. The Objectors claim that Green v. Santa Fe Industries, Inc., 533 F.2d 1283 (2d Cir.) reh. en banc denied, 533 F.2d 1309 (2d Cir.), cert. granted, 45 U.S.L.W. 3249 (Oct. 5, 1976), is authority to disapprove the settlement and merger because they lack any justifiable corporate purpose of Indian Head. Brief for Appellants at 50. The Objectors disregard a fact of which Indian Head has long been aware, namely, that it is a defendant in all three actions here involved. Aside from the obvious business purpose of Indian Head in settling all claims (including the Indenture-based claims on which, if proven, Indian Head would be primarily liable), it must be recalled that in Green there was a patent and a substantial claim that the merger price was unfair. Despite their fulsome polemics on every other conceivable issue, the Objectors have never claimed that the merger price or any of the settlement payments are unfair.

and concluded that they "were not meant to apply to judicially approved settlement agreements." (374a). Instead, their focus is upon protection of the individual investor by requiring substantial and timely disclosure of facts relevant to the transaction in question.²⁰

"[The Williams Act] requires disclosure of, among other things, the identity and background of the person or group making the tender offer; the size of the holdings of the person or group; the source of funds to be used and the financing arrangement for these funds; the purpose of the tender offer, and the plans of the offeror (to liquidate, sell, merge, etc.); and the price, terms, and conditions of the offer.

We find that the individual investors have been more than adequately protected by the procedures followed in the instant judicially-approved settlement, where the individual investor has had full notification of the terms of the offer, the people or groups involved, the purpose of the offer and the plans of the offeror." (375-76a).

Thus, the District Court properly concluded that the Williams

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20. Judge Stewart relied upon the analysis of the Seventh Circuit in Bath Industries, Inc. v. Blot, 427 F.2d 97, 109 (1970) (375a):

"[T]he overriding purpose of Congress in enacting this legislation was to protect the individual investor when substantial shareholders or management undertake to acquire shares in a corporation for the purpose of solidifying their own position in a contest over how or by whom the corporation should be managed. In the words of Senator Williams: '[The bill] is designed solely to require full and fair disclosure for the benefit of investors'."

See also Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 945 (2d Cir. 1969); 113 Cong. Rec. 24664 (1967).

Act was not addressed to a judicially-approved settlement,²¹ and that in any event the purposes of that Act had been accomplished by the operation of Rule 23.²²

POINT IV

A BAR ORDER IS PROPER IN CLASS ACTION SETTLEMENTS

The Objectors complain that the Judgment improperly enjoins all class members from prosecuting any claim arising out of or relating to the subject matter of the complaints. (185a-9). They suggest that the inclusion of this bar order disturbs the general principle that the res judicata effect of a judgment can only be determined in a subsequent action.

Rule 23 was completely revised in 1966 to correct the failure of the original rule to provide "an adequate guide to the proper extent of judgments." Note, Collateral Attack On The Binding Effect of Class Action Judgments, 87 Harv. L. Rev. 589, 592 (1974). Revised Rule 23 (c)(3) provides

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21. Following the merger, the Debentures and Warrants no longer had a call on Common Stock or any other "equity security" within the meaning of Sections 13(d) and (e) and 14(d) and (e) of the 1934 Act. Thus, the tender offer provisions of the 1934 Act are inapplicable to TBI's agreement to pay cash for them.
 22. This analysis also applies to the Objectors' allegation that the Pennsylvania Securities Act was violated by the Notice of the proposed settlement, since the Objectors read the Pennsylvania statute to be in pari materia with the federal legislation.

that any judgment, whether for or against the class, shall include and describe all those whom the court finds to be members of the class. The Advisory Committee Note to this section states that

"[t]he court . . . in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time and if raised will be more satisfactorily answered."
39 F.R.D. 98, 105 (1966).

The injunction here protects the Judgment of the court and serves the purposes of res judicata: it both assures the finality of the Judgment and conserves judicial resources while recognizing the rights of litigants to have their day in court.²³

Pursuant to its historic powers as a court of equity, a federal district court may make such orders as may be necessary to protect or enforce its own decrees. Thus, it may enjoin a party from proceeding in another forum because those proceedings tend to circumvent the policies of the forum issuing the injunction or because other equitable considerations warrant preclusion of those proceedings. The

23. Use of a bar order in class actions is particularly appropriate because the binding effect of such judgments is "a recognized exception" to the general rule that persons who have not been made parties to an action will not be bound by judgments rendered therein. Hansberry v. Lee, 311 U.S. 32, 40-41 (1940).

power of a federal court "to protect or effectuate its judgments" is a recognized exception to the limitations on the powers of the federal courts under the anti-injunction statutes. 28 U.S.C. § 2283. (1948). In appropriate circumstances, a party with a favorable federal judgment need not rely on a plea of res judicata for the vindication of rights derived from the judgment. The court rendering the judgment may enjoin proceedings brought in other courts that constitute attempts to relitigate matters previously adjudged. See, e.g., International Association of Machinists and Aerospace Workers v. Nix, 512 F.2d 125 (5th Cir. 1975); Columbia Plaza Corp. v. Security National Bank, 525 F.2d 620 (D.C. Cir. 1975); Johnson v. Radford, 449 F.2d 115 (5th Cir. 1971); Helene Curtis Industries v. Sales Affiliates, 247 F.2d 940 (2d Cir. 1957).

Incorporation of a bar order in a judgment approving settlement of a class action has been considered and approved in previous decisions. In Fox v. Glickman Corporation, 253 F. Supp. 1005 (S.D.N.Y. 1966), Judge Metzner approved the issuance of a permanent injunction following settlement of several class actions pursuant to original Rule 23 (prior to its amendment in 1966). Judge Metzner observed that there had been extensive pre-trial proceedings, that settlement negotiations had culminated in the signing by all parties of a settlement agreement which reflected an objective evaluation of the facts and the difficult questions of law

involved in each case; and that the full text of the settlement agreement, with notice of application for its approval, had been mailed to class members and published in newspapers. Under these conditions, Judge Metzner concluded that it was proper to include a bar to future claims in the settlement order:

"It seems to the court that unless such an order is possible none of these suits as a practical matter can ever be settled, since no defendant will pay until the statute of limitations has run against every possible claim." 253 F. Supp. at 1013.

That the Agreement here was not mailed to each class member is not a basis upon which to distinguish the holding in Fox. Mailing the Agreement to each class member would not have given notice of the precise nature of the settled claims. Quite properly, the Agreement and the Notice did not describe in detail the claims asserted in the complaints, but instead specified the terms and conditions of the settlement and the mechanics for its execution. The Notice, moreover, described what class members stood to gain or lose from participating in or opting out of the settlement. Paragraph 6 of the Notice also made clear that the Agreement and, equally importantly, the pleadings, were available for inspection. (185a-17).

The Notice was mailed to class members and was published in newspapers pursuant to court order. The Agreement itself was filed with the Clerk of the Court. Moreover, the

presence of plaintiffs' counsel and class representatives insured that all of the facts were developed in vigorously contested motion practice, in laborious settlement negotiations and through briefs and oral argument. Thus, inclusion of an injunctive bar in the Judgment is proper here as it was in Fox.²⁴

In Cherner v. Transitron Electronic Corporation, 221 F. Supp. 48 (D. Mass. 1963), the court granted approval of a class action settlement which contemplated the entry of a bar order. The bar was directed against prosecution of "any claim embraced in the pleadings" by persons who were not parties. Noting that there was a divergence of authority as to the validity of such an order,²⁵ the court concluded,

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24. See also Derdiarian v. Futterman Corporation, 38 F.R.D. 178 (S.D.N.Y. 1965) (injunctive bar included in settlement order without discussion); Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622 (S.D.N.Y. 1967) (subsequent suit stayed under injunction by class action court).
25. The divergence of authority was the result of the failure of original Rule 23 (prior to its amendment in 1966) to specify the binding effect of class action judgments. Among the authorities noted in support of the bar were: Weeks v. Bareco Oil Co., 125 F.2d 84, 91 (7th Cir. 1941); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587-590 (10th Cir. 1962) semble; 2 Barron & Holtzoff, Federal Practice and Procedure (1961), § 572; see also Chafee, Some Problems of Equity (1950) 250-258; Kalven and Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941); Note, Binding Effect of Class Actions, 67 Harv. L. Rev. 1059 (1954). Authorities contra were: Oppenheimer v. F.J. Young & Co., Inc., 144 F. 2d 387, 390 (2d Cir. 1944); see also Zachman v. Erwin, 186 F. Supp. 681, 689 (S.D. Tex. 1960); Newberg v. American Dryer Corp., 195 F. Supp. 345, 348 (E.D. Pa. 1961); 3 Moore's Federal Practice, ¶ 23.11, especially at 3465 et seq.

nevertheless, that it created no discrimination against objectors:

"Anyone who wishes may stay out of the settlement of this case, and, on his own, sue defendants to establish their liability and his damage. In that proceeding he may contend that this Court was without jurisdiction to bar his claim. But a dissenter asks too much if he wants this Court to refuse to insert in its judgment a bar order for which there is strong judicial precedent and which defendants have explicitly stated is an indispensable condition of their paying any money at all. Inasmuch as the vast majority of shareholders who have expressed their views want to share in a compromise at or near the 5 million dollar figure, it would be most unjust to deny them the opportunity to get any money because of objections of other stockholders whose fundamental contention is that they not only will not be, but indeed cannot be, adversely affected by anything that this Court does in this case."
221 F. Supp. at 53.

In light of the reasons why a permanent injunction is appropriate under Rule 23, it is apparent why the Objectors' arguments under Rule 65 are inapposite. Once it is clear that an injunction may follow court approval of a class action settlement, there can be no objection that a full hearing on the merits was not held--there is no such hearing under Rule 23. Rather, a hearing on the fairness of the settlement was held in order to insure that the interests of absent class members were properly represented and compensated. In turn, the defendants, and especially TBI, which has agreed to pay \$32 million in this settlement, require the protection of the injunction to assure that they will be free from further burdensome and expensive litigation over the same matters, perhaps in numerous distant forums.

The Objectors also complain that notice of inclusion of the bar order was not contained in the Notice and that, as a result, they should not be barred from relitigating their objections. The Notice, however, clearly advised the class members that failure to request exclusion would result in their being bound by all the terms of the Judgment. Paragraph 3 of the Notice, entitled "Effect of Accepting Settlement," stated in pertinent part:

"If you are a class member and neither exclude yourself from the settlement in the manner prescribed below nor file a timely and proper Proof of Claim or Transmittal Letter as provided herein, you will be forever barred from recovery from the defendants with respect to all claims which are or could have been asserted in these actions." (185a-16).

Paragraph 24 of the Notice, concerning requests for exclusion, reiterated the point:

"Failure to submit a request for exclusion . . . will result in a class member being bound by the terms of any judgment or order in the above-captioned actions, including a judgment and order approving the proposed settlement." (185a-30).

In short, the injunction contained in the Judgment was proper.

CONCLUSION

For the foregoing reasons, this last assault by the Objectors upon the settlement and merger should not be countenanced. The record in the District Court demonstrates that all relevant factors bearing on the fairness of the settlement were considered, that the strengths and weaknesses of the plaintiffs' and the objectors' claims were analyzed and weighed, and that the risks and costs necessarily inherent in taking any litigation to completion were evaluated and resolved in favor of settlement. Against the strength of this record, the Objectors have not sustained their burden of proving that Judge Stewart abused his discretion in approving this settlement. The judgment and order below should be affirmed.

Respectfully submitted,

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A D D E N D U M
STATUTES AND RULES

TITLE 28 JUDICIARY AND JUDICIAL PROCEDURE

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968.

SECURITIES ACT OF 1933

§ 77b. Definitions

When used in this subchapter, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

§ 77c. Exempted securities

(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

(10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

§ 77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

SECURITIES EXCHANGE ACT OF 1934

§ 78m. Periodical and other reports

(d) (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l (g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a) (6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) (1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78l of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g) (2) (G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties, to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him

PARTIES

Rule 23

from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 65. Injunctions**(a) Preliminary Injunction.**

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) **Employer and Employee; Interpleader; Constitutional Cases.** These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

DELAWARE GENERAL CORPORATION LAW

§253. Merger of parent corporation and subsidiary or subsidiaries

(a) In any case in which at least 90 percent of the outstanding shares of each class of the stock of a corporation or corporations is owned by another corporation and 1 of the corporations is a corporation of this State and the other or others are corporations of this State, or any other state or states, or the District of Columbia and the laws of such other state or states, or the District permit a corporation of the jurisdiction to merge with a corporation of another jurisdiction, the corporation having such stock ownership may either merge the other corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such other corporations, into 1 of the other corporations by executing, acknowledging and filing, in accordance with section 103 of this title, a certificate of such ownership and merger setting forth a copy of the resolution of its board of directors to so merge and the date of the adoption; provided, however, that in case the parent corporation shall not own all the outstanding stock of all the subsidiary corporations, parties to a merger as aforesaid, the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation. If the parent corporation be not the surviving corporation, the resolution shall include provision for the pro rata issuance of stock of the surviving corporation to the holders of the stock of the parent corporation on surrender of the certificates therefor, and the certificate of ownership and merger shall state that the proposed merger has been approved by a majority of the outstanding stock of the parent corporation entitled to vote thereon at a meeting duly called and held after 20 days notice of the purpose of the meeting mailed to each such stockholder at his address as it appears on the records of the corporation. A certified copy of the certificate shall be recorded in the office of the Recorder of the County in this State in which the registered office of each constituent corporation which is a corporation of this State is located. If the surviving corporation exists under the laws of the District of Columbia or any state other than this State, the provisions of section 252(d) of this title shall also apply to a merger under this section.

(b) If the surviving corporation is a Delaware corporation, it may change its corporate name by the inclusion of a provision to that effect in

the resolution of merger adopted by the directors of the parent corporation and set forth in the certificate of ownership and merger, and upon the effective date of the merger, the name of the corporation shall be so changed.

(c) Any merger which effects any changes other than those herein specifically authorized with respect to the parent corporation shall be accomplished under the provisions of sections 251 or 252 of this title. The provisions of section 262 of this title shall not apply to any merger effected under this section, except as provided in subsection (d) of this section.

(d) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under this section is not owned by the parent corporation immediately prior to the merger, the surviving corporation shall, within 10 days after the effective date of the merger, notify each stockholder of such Delaware corporation that the merger has become effective. The notice shall be sent by certified or registered mail, return receipt requested, addressed to the stockholder at his address as it appears on the records of the corporation. Any such stockholder may, within 20 days after the date of mailing of the notice, demand in writing from the surviving corporation payment of the value of his stock exclusive of any element of value arising from the expectation or accomplishment of the merger. If during a period of 30 days after such period of 20 days the surviving corporation and any such objecting stockholder fail to agree as to the value of such stock, any such stockholder or the corporation may file a petition in the Court of Chancery as provided in subsection (c) of section 262 of this title and thereupon the parties shall have the rights and duties and follow the procedure set forth in subsections (d) to (j) inclusive of section 262.

(e) A merger may be effected under this section although one or more of the corporations parties to the merger is a corporation organized under the laws of a jurisdiction other than one of the United States; provided that the laws of such jurisdiction permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction; and provided further that the surviving or resulting corporation shall be a corporation of this State.

(f) The provisions of section 251(d) of this title shall apply to a merger under this section and the provisions of section 251(e) shall apply to a merger under this section in which the surviving corporation is a corporation of this State.

DELAWARE GENERAL CORPORATION LAW

§259. Status, rights, liabilities, etc., of constituent and surviving or resulting corporations following merger or consolidation

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

(b) In the case of a merger of banks or trust companies, without any order or action on the part of any court or otherwise, all appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, trustee of estates of persons mentally ill and in every other fiduciary capacity, shall be automatically vested in the corporation resulting from or surviving such merger; provided, however, that any party in interest shall have the right to apply to an appropriate court or tribunal for a determination as to whether the surviving corporation shall continue to serve in the same fiduciary capacity as the merged corporation, or whether a new and different fiduciary should be appointed.

NEW YORK GENERAL CONSTRUCTION LAW

§ 39. Property, personal

The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership.

Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.

CHAPTER 1.5 PENNSYLVANIA SECURITIES ACT OF 1972 [NEW]

PART IV. FRAUDULENT AND PROHIBITED PRACTICES

§ 1—401. Sales and purchases

It is unlawful for any person, in connection with the offer, sale or purchase of any security in this State, directly or indirectly:

- (a) To employ any device, scheme or artifice to defraud;
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

1972, Dec. 5, P.L. 1280, No. 284, § 401, eff. Jan. 1, 1973.

§ 1—402. Market manipulation

It is unlawful for any person, directly or indirectly, in this State:

(a) For the purpose of creating a false or misleading appearance of active trading in a security or a false or misleading appearance with respect to the market for a security:

(i) to effect any transaction in the security which involves no change in the beneficial ownership thereof; or

(ii) to enter any order or orders for the purchase (or sale) of the security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price for the sale (or purchase) of the security, have been or will be entered by or for the same or affiliated persons;

(b) To effect, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in the security or raising or depressing the price of the security for the purpose of inducing the purchase or sale of the security by others; or

(c) To induce the purchase or sale of any security by the circulation or dissemination of information to the effect that the price of the security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of the security, if he is selling or offering to sell or purchasing or offering to purchase the security or is receiving a consideration, directly or indirectly, from any such person.

1972, Dec. 5, P.L. 1280, No. 284, § 402, eff. Jan. 1, 1973.

§ 1—403. Prohibited transactions; broker-dealers and agents

No broker-dealer or agent shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in this State by means of any manipulative, deceptive or other fraudulent scheme, device, or contrivance, fictitious quotation, or in violation of this act or any regulation or order hereunder.

1972, Dec. 5, P.L. 1280, No. 284, § 403, eff. Jan. 1, 1973.

§ 1—404. Prohibited activities; investment advisers

It is unlawful for any investment adviser, directly or indirectly, in this State:

(a) To employ any device, scheme, or artifice to defraud any client or prospective client.

(b) To engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

(c) Acting as principal for his own account, knowingly to sell any security to or purchase any security from a client for whom he is acting as investment adviser, or, acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of the transaction the capacity in which he is acting and obtaining the written consent of the client to such transaction.

(d) To engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

(e) To represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless his principal business consists of acting as investment adviser and a substantial part of his business consists of rendering investment advisory services on the basis of the individual needs of his clients.

(f) Unless an adviser is registered as a broker-dealer under this act, to take and have custody of any securities or funds of any client if he fails to meet such requirements therefor as may be prescribed by the commission by regulation.

1972, Dec. 5, P.L. 1280, No. 284, § 404, eff. Jan. 1, 1973.

Uniform Law:

This section is similar to section 102 of the Uniform Securities Act. See volume 9 Uniform Laws Annotated.

§ 1—405. Contract requirements

It is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing:

(1) that the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) that no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract; and

(3) that the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.

Clause (1) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates or taken as of a definite date, or in any other manner permitted by the Investment Advisers Act of 1940,¹ and the rules and regulations promulgated thereunder or any contract for the rendering of investment advisory services to an institutional investor. "Assignment," as used in clause (2), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but, if the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.

1972, Dec. 5, P.L. 1280, No. 284, § 405, eff. Jan. 1, 1973.

(d) To engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

(e) To represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless his principal business consists of acting as investment adviser and a substantial part of his business consists of rendering investment advisory services on the basis of the individual needs of his clients.

(f) Unless an adviser is registered as a broker-dealer under this act, to take and have custody of any securities or funds of any client if he fails to meet such requirements therefor as may be prescribed by the commission by regulation.

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1972, Dec. 5, P.L. 1280, No. 284, § 405, eff. Jan. 1, 1973.

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Robert S. Blanc, being duly sworn,
says: that I am over the age of eighteen years and am not
a party herein, and that on the 9th day of March
19 77, I served a true copy* of the within

Brief for Defendants-Appellees (* two copies served)
upon the attorneys hereinafter named at the places herein-
after stated and set below their respective names by
depositing the same, properly enclosed in a post-paid,
properly addressed wrapper, in an official depository under
the exclusive care and custody of the United States Post
Office Department at Wall & William Sts.
within the City and State of New York, directed to said
attorneys at their respective addresses given below, which
were designated by them for that purpose upon the preceding
papers in this action, to wit:

<u>Name & Address</u>	<u>Attorney for</u>
Austrian, Lance & Stewart, P.C. 630 Fifth Avenue New York, New York 10020	Plaintiffs-Appellees
Wolf Haldenstein Adler Freeman H.A. & F.	Plaintiffs-Appellees

(d) To engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

(e) To represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless his principal business consists of acting as investment adviser and a substantial part of his business consists of rendering investment advisory services on the basis of the individual needs of his clients.

(f) Unless an adviser is registered as a broker-dealer under this act, to take and have custody of any securities or funds of any client if he fails to meet such requirements therefor as may be prescribed by the commission by regulation.

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§ 1—405. Contract requirements

It is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing:

(1) that the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) that no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract; and

(3) that the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.

Clause (1) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates or taken as of a definite date, or in any other manner permitted by the Investment Advisers Act of 1940,¹ and the rules and regulations promulgated thereunder or any contract for the rendering of investment advisory services to an institutional investor. "Assignment," as used in clause (2), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but, if the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.

1972, Dec. 5, P.L. 1280, No. 284, § 405, eff. Jan. 1, 1973.

Wolf Haldenstein Adler Freeman
Herz & Frank
270 Madison Avenue
New York, New York 10016

Plaintiffs-Appellees

Weinstein & Levinson
11 Park Place
New York, New York 10007

Plaintiffs-Appellees

Shea, Gould, Climenko & Casey
330 Madison Avenue
New York, New York 10017

Appellants

Blank, Rome, Klaus & Comisky
Four Penn Center Plaza
Philadelphia, Pa. 19103

Appellants

Robert B. Lane

Sworn to before me this
9th day of March, 1977

Mari L. Lannan

MARION BANNON
Notary Public, State of New York
No. 31-5169913
Qualified in New York County
Commission Expires March 30, 1978

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Robert S. Blanc, being duly sworn,
says: that I am over the age of eighteen years and am not
a party herein, and that on the **9th** day of **March**
19 77, I served a true copy* of the within

Brief for Defendants-Appellees (* two copies served)

upon the attorneys hereinafter named at the places herein-
after stated and set below their respective names by
depositing the same, properly enclosed in a post-paid,
properly addressed wrapper, in an official depository under
the exclusive care and custody of the United States Post
Office Department at **Wall & William Sts.**
within the City and State of New York, directed to said
attorneys at their respective addresses given below, which
were designated by them for that purpose upon the preceding
papers in this action, to wit:

<u>Name & Address</u>	<u>Attorney for</u>
Austrian, Lance & Stewart, P.C. 630 Fifth Avenue New York, New York 10020	Plaintiffs-Appellees
Wolf Haldenstein Adler Freeman Herz & Frank 270 Madison Avenue New York, New York 10016	Plaintiffs-Appellees
Weinstein & Levinson 11 Park Place New York, New York 10007	Plaintiffs-Appellees
Shea, Gould, Climenko & Casey 330 Madison Avenue New York, New York 10017	Appellants
Blank, Rome, Klaus & Comisky Four Penn Center Plaza Philadelphia, Pa. 19103	Appellants

Robert S. Blane

Sworn to before me this
9th day of *March*, 1971

Marion Bannon

MARION BANNON
Notary Public, State of New York
No. 31-5169913
Qualified In New York County
Commission Expires March 30, 1978